Supreme Court, U.S.
FILED
06-76 JUN 5 2006
OFFICE OF THE CLERK

Docket No. _____

Companion Case No. 05-1139

UNITED STATES SUPREME COURT

OCTOBER TERM, 2005

In re Jessie D. McDonald,
Petitioner

PETITION FOR EXTRAORDINARY RELIEF

Petition for Writ of Mandamus and Prohibition

For the Petitioner:
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QUESTIONS FOR REVIEW

1. Whether the one year statute of limitation for Rule 60.02, of Tennessee Rules on Civil Procedure meets constitutional requirements when it prevents a void judgment from being set aside ?

2. Whether a judge or court has jurisdiction to foreclose a litigant's right to access of the courts to have a question of law reviewed?

3. Whether a judge has jurisdiction to enforce the judgment of another judge that was entered in another case and not a part of the matter pending before the court, on its own initiative, without a request being made by either party in the original case?

4. Whether a judge exceeded the jurisdiction conferred by attempting to enforce a judgment entered by another judge when the original judge recused himself from future proceedings against the petitioner, based on bias and prejudice?

5. Whether a judge failed to perform a ministerial duty, by refusing to set aside a void judgment, entered in the absence of an indictment, in violation of the Fifth Amendment requirements in the United States Constitution?

6. Whether the judges acted within their judicial powers to deprive the petitioner of access to the various courts, within their immunity protection, to deny relief from a void judgment?

List of Parties

1. Mark J. Fishburn, Judge for Division VI, Criminal Court for Nashville and Davidson County, at Nashville, Tennessee.

2. Cheryl Blackburn, Judge for Division III, Criminal Court for Nashville and Davidson County, at Nashville, Tennessee.

3. Aleta A. Trauger, Judge for the U.S. District Court for the Middle District of Tennessee, at Nashville, Tennessee.

4. Joe B. Brown, U.S. Magistrate for the U.S. District Court for the Middle District of Tennessee, at Nashville, Tennessee.

5. Frank F. Drowota, III and the entire Tennessee Supreme Court, [with the exception of Justice A.A. Birch, Jr., who refused to participate in the decision]

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[Authorities Continue]

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Orders Entered by Court

March 08, 2006, Division VI, Criminal Court entered an Order denying the Motion for Relief from Judgment under Rule 60, of Tennessee Rules on Civil Procedure. [Exhibit #1] and included in the Appendix of this petition; Date denying Motion to Reconsider is unknown.

Statement on Jurisdiction

In exercise of this court's appellate jurisdiction, the petitioner respectfully submit this application for a writ of mandamus and prohibition to review the final decision of the trial court, entered on March 08, 2006, denying the application for relief from judgment, on grounds, the petitioner has been denied access to State and the U.S.

District Court [as shown in Case No. 05-1139] and there is no other court that has appellate jurisdiction to review this case; and this conviction is in violation of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution since I have never been indicted for the crime the conviction is based on; and a void judgment is binding on no one.

Order entered March 08, 2006, Mark Fishburn, Judge for Division VI, Criminal Court for Nashville and Davidson County, Tennessee, denied the Motion for Relief from a void judgment for a criminal conviction, in the absence of an indictment, submitted in compliance with Rule 60 of Tennessee Rules on Civil Procedure.

The Motion to Reconsider was denied and the date the Order was entered is unknown.

U . Constitutional Provision Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury", . . . [pertinent section supplied]

Statutory Provision

This Court has jurisdiction under 28, § 1651(a) of the United States Codes to grant extraordinary relief.

Notification

Notification to Tennessee Attorney General and Solicitor General was made through Proof of Service.

Concise Statement of the Case

The federal question was first observed in the trial court on March 08, 2006 and due to being denied access to state and federal courts, there was no opportunity to present the federal question at first instance to any court.

On March 08, 2006, the Motion for Relief from Judgment under Rule 60.02 was denied by the trial court.

Date denying rehearing is unknown.

Concise Argument

This application for a writ of mandamus and prohibition is in the aid of this Court's appellate jurisdiction and when the state and federal court's denied the petitioner of access to the various courts to seek relief from a void judgment entered in violation of the Fifth Amendment to the U.S. Constitution in the absence of an indictment for the charge the conviction is based on; violates the due process clause of the Fourteenth Amendment to the United States Constitution and has created exceptional circumstances warranting the exercise of this Court's discretionary powers and adequate relief cannot be obtained in any other form or from any other court since there is no other court that has appellate jurisdiction over the Tennessee Supreme Court, other than this Court, under the Rooker-Feldman Doctrine.

The petitioner has a right under Rule 60 of Tennessee Rules on Civil Procedure to have a void judgment vacated or set aside as shown below:

60.02. Mistakes —Inadvertence —Excusable Neglect — Fraud, etc. — "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

To show that the conviction, in the absence of an indictment is void as a matter of law, such a conviction

cannot stand. Criminal prosecutions cannot be sustained by intendment, but everything necessary to constitute the offense must be charged." *Church v. State,* 206 Tenn. 336, 333 S.W. 2d 799; *Huffman v. State*, 200 Tenn. 487, 495, 292 S.W. 2d 738; *Clark v. State,* 197 Tenn. 67, 270 S.W. 2d 361. See also: 21 Am. Jur. 2d., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. *Thompson v. City of Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.ed. 2d 654."

ACCORDINGLY, a void judgment is binding on no one and even if the one year statute of limitation is valid, it can only apply to judgments rendered by courts acting with jurisdiction over the defendant as well as the cause for action. In the case at bar, the trial court cannot have jurisdiction over the persons of a defendant, in the absence of an indictment within the meaning of the Fifth Amendment to the United States Constitution. The indictment that was used to bring this case to trial alleged the property to be a '72 Ford

LTD 'automobile', but the jury based its guilty verdict on the property being a' 72 Ford LTD automobile', which was purchased under a valid contractual agreement, which was never challenged at the trial, nor was the petitioner charged with providing false information to obtain the credit or loan to purchase the said automobile and this matter is wanton of criminality and was brought to trial based solely on prosecutorial misconduct, and malice for the purpose of depriving the petitioner of his federal protected rights to due process of law.

The one year statute of limitation app. .ation under Rule 60.02, TRCP was not applicable in January of 1973 and there was no stipulation that it be applied on a retroactive basis, and even if it was, it would create a conflict with the prohibition against ex post facto laws. Therefore, the notice of appeal to bring the matter for review was proper in case no. 05-1139. When the appeal was summarily dismissed by the clerk [Appendix, p.1-Letter] prevents this case from

being considered on appeal. When a state court has dismissed an appeal, improperly, mandamus will lie to compel its reinstatement. Ex parte Parker, 9 S. Ct. 708, 131 U. S. 221, 33 L. Ed. 123; Ex parte Parker, 7 S. Ct. 767, 120 U. S. 737, 30 L. Ed. 818. In the matter before the trial court and Judge Fishburn, the court held the one year statute of limitation applies to void judgments, by its actions to deny relief on the Rule 60.02 Motion for Relief from Judgment. The only office of writ of mandamus when issued to subordinate court is to direct performance of ministerial act or to command court to act in case where court has jurisdiction and refuses to act, but supervisory court will never prescribe what decision of subordinate court shall be nor will supervisory court interfere in any way to control judgment or discretion of subordinate court in disposing of controversies. *Ex parte Newman*, 81 U. S. 152, 14 Wall. 152, 20 L. Ed. 877.

Mandamus may be used to restrain inferior courts to keep them within their lawful bounds; and Mandamus is an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by the virtue of their office, bound to do. *Com. Of Virginia v. Rives,* 100 U.S. 313, 25 L. Ed. 667. A rule was granted to show cause why mandamus should not be awarded to a district judge commanding him to do certain acts relative to a cause instituted in the district court. *Ex parte Bradstreet,* 31 U. S. 774, 6 Pet. 774, 8 L. Ed. 577. As respects mandamus, discretion of court is not unlimited and if exercised with manifest injustice, higher court will command its due exercise; no amount of judicial discretion of a court can supply a defect or want of jurisdiction. *Ex parte Bradley*, 74 U. S. 364, 7 Wall. 364, 19 L. Ed. 214; and merely confine a lower court to sphere of its discretionary power. *Will v. U.S.*, 88 S. Ct. 269, 389 U. S. 90, 19 L. Ed. 2d 305. The writ of mandamus is appropriately issued when there is

usurpation of judicial power or clear abuse of discretion. *Schlagenhauf v. Holder*, 85 S. Ct. 234, 379 U. S. 104, 13 L. Ed. 2d 152.

Relief Sought

For the foregoing reasons, the Petitioner, Jessie D. McDonald, respectfully request this court for relief as follows:

(1) Upon this court deciding the constitutionality of Rule 60.02 one year statute of limitation for consideration of void judgments, remand the case back to Division VI Criminal Court for the case to be disposed of on its merits;

(2) Instruct the district court to show cause why mandamus should not issue commanding Judge Trauger to vacate the order that was entered and to issue an order that is confined to the issues that was presented in the case that was before her court, by the parties involved in the case before her court and with specific instructions to stay within her lawful bounds, without subjecting the petitioner to bias and

prejudicial acts of restraints; and singling him out with restraints not imposed on other litigants before her court that violates the spirit of 42,§ 1983, U.S.C.;

(3) All other and further relief the court deems proper; Including an Order to the Clerk of the Tennessee Supreme Court to set aside the previous Orders from former Justice Frank Drowota, III, foreclosing the rights to review cases seeking relief from the January, 1973 under Docket No. B-317 from Division III, Criminal Court for Nashville and Davidson County, Tennessee.

Respectfully submitted,

/s/ Dr. Jessie D. McDonald, Ed. D.

APPENDIX INDEX

Documents	Pages
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IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION VI

JESSIE D. MCDONALD	)	**Filed March 8, 2006**
	)	
V.	)	**No. B-317**
	)	
STATE OF TENNESSEE	)	

ORDER

This matter came before the Court on March 3, 2006, upon Petitioner's Motion for Relief from Judgment. The Petitioner claims that he is entitled to relief based on Rule 60(b). The Court is under the assumption that the Rule being cited are the Rules of Civil Procedure, in particular Rule 60.02 of the Tennessee Rules of Civil Procedure in which Relief form Judgment may be granted based on mistakes, inadvertence, excusable neglect, fraud, etc. Tennessee Rule of Civil Procedure 60.02 states that for this Court to review such, it must be filed in a timely fashion, in particular "not more than one year after the judgment, order or proceeding

was entered or taken." As noted in the file, the Petitioner was found guilty by a jury on January 1973. The time between that judgment and this motion has surpassed the allowed filing time, and because such motion was not timely filed, the Court respectfully dismisses Petitioner's motion.

It is so ORDERED.

Entered this 8th. day of March, 2006
/s/ Mark J. Fishburn, Judge
Criminal Court, Division VI